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TWO TREATIES OF PARIS & THE SUPREME COURT

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TWO
TREATIES OF PARIS
AND
THE SUPREME COURT

BY

SIDNEY WEBSTER

UNIV. OF CALIFORNIA

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TWO TREATIES OF PARIS

TWO TREATIES OF PARIS

CHAPTER I

THE Treaty of Paris, which nearly a century ago ceded Louisiana, surprised Congress and the country, as did the recent one with Spain which ceded islands in the East Indies and the West Indies. Both were concluded in that city where have been many conventions and arbitrations profoundly affecting the United States. The first was a victory of peace; the last was a trophy of war.

For the first were paid eighty millions of francs, one-fourth to be used by France to pay debts owed by her to citizens of the United States; the cost of the second treaty was a war requir-

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ing an estimated expenditure of not less than two hundred and fifty millions of dollars, and twenty millions paid to Spain, in addition to the unascertained and unlimited millions to be paid, under the seventh article, by the United States to its own citizens.

Only New Orleans and West Florida were in the public mind when Jefferson began negotiations for the treaty of 1803, which ceded all the rights and interests ever possessed by France, or Spain, in the province of Louisiana (which probably included Texas), now the seat of almost as many States as were the sixteen composing the Union when its President achieved the transfer—a treaty more beneficial to our country than any in its archives, excepting that of alliance with France in 1778, and the definitive treaty of peace with England. The demand upon Spain, which resulted in the second Treaty of Paris, only required a relin-

quishment of Cuba to Spanish subjects; but by war the United States enforced that relinquishment and then insisted upon the unexpected cession of Porto Rico, Guam, and the Philippine archipelago.

By the first treaty, France ceded her province of Louisiana to the United States in full sovereignty, subject, of course, to the perfect inviolability of all vested private rights. The United States stipulated that the "inhabitants" of the ceded territory should be incorporated into the Union, and according to the *principles* of the Federal Constitution be admitted to all the rights, advantages, and immunities of citizens, and in the mean time be maintained and protected in the free enjoyment of their liberty, property, and the religion which they professed. By those stipulations the "inhabitants," although they did not obtain an immediate right to participate in the political power of the government of the

United States, did obtain immediate admission to the enjoyment of all the privileges, rights, and immunities of citizens, and of a government by Congress according to the Constitution till incorporated as a State into the Union. Those "principles," recognized by the treaty, did not then permit black men or red men to be citizens of the United States, and they were excluded from the benefits of the stipulation. There was nothing novel in an international agreement promising that private property should not be confiscated, nor private rights annulled. Although the inhabitants of a ceded place change their allegiance, yet their relations to each other and their rights of property remain unaffected by the change. Public law affirmed it. Had not such promises been made by the United States, the judicial power could, as it was then assumed, protect those rights, and give relief to any white inhabitant of the ceded province who car-

ried into court and proved a complaint that his stipulated right to liberty, property, or religion had been violated.

By the second treaty, Spain gave up to the United States islands in the East and West Indies, and it was promised that the property, or rights which by law belong to the peaceful possession of property of all kinds, either by individuals, ecclesiastical or civil bodies, should not be impaired and that the "inhabitants" should be secured in the free exercise of their religion, but nothing was stipulated in regard to incorporation into the Union, or to all the rights, advantages, and immunities of citizens of the United States, as in the first treaty. On the contrary, it was declared in the second treaty that "the civil rights and political status of the native inhabitants of the territory hereby ceded to the United States shall be determined by *Congress,*" and that Spanish subjects, natives of the peninsula, residing in the ceded territory,

shall, if their Spanish allegiance be renounced and they remain in the territory, be held to have adopted the nationality, not of the United States, but of the "territory" in which they may reside, and to have become citizens of that territory.

When the first treaty was negotiated, steam and electricity did not swiftly transmit through the Atlantic messages from the Government at Washington to its representatives in Europe. Monroe was a month making the journey from Washington to Paris. At the end of six months, Jefferson had no tidings of the effect produced upon Napoleon by the warning he had sent, but McKinley could each evening know the day's doings in Paris and continually keep his hand on the negotiations.

The published protocols of the second treaty are so complete that one can see each step in the negotiations, but it would now be quite impossible to follow the

threads of the first treaty were it not for Monroe's private diary.

The wars which convulsed Europe during the eighteenth century resulted in struggles between European powers for possessions in the New World, and that fact became the pivot on which turned Jefferson's achievement of the first treaty.

Spain had been the earliest in discoveries and settlements in America. Holland, France, and England began establishments nearly a century later, and contemporaneously with one another—the former at New York, France at Quebec, and England at Jamestown. The Dutch surrendered New York to the English in 1664, and thereafter turned their attention to the East Indies. Greater France comprised in 1750 the basins of the St. Lawrence, of the Great Lakes, and of the Mississippi; but nine years later England had conquered Canada, and in 1763, by the treaty of Fontainebleau, Canada, and all the possessions of either

France or Spain, on the continent of North America east of the Mississippi, were surrendered to Great Britain, with the exception of New Orleans, which was retained by France. On the same day a secret treaty between France and Spain conveyed Louisiana and New Orleans to Spain. Thus did they traffic, barter, and exchange in the New World. England was thereby lifted to the summit of her territorial greatness in America, but twenty years had not gone by before she acknowledged the independence of the thirteen colonies and ceded Florida back to Spain.

No sooner had those treaties of cession and retrocession been ratified and exchanged than the relations of the three governments began to be again strained. Spain, however, moved by divers motives, offered to the United States in 1795 a most liberal treaty, which was accepted. It gave a right of deposit and storage at New Orleans for our Western products.

and conceded "free ships, free goods." Meanwhile, France, more and more desirous to be again an American power after the loss of Canada, the Mississippi, and Louisiana, which the zeal of her priests and the valor of her soldiers had won, asked Spain to retrocede Louisiana, which, finally, five or six months before Jefferson's first inauguration, she secretly promised to do.

The secret was well kept. The promise was not suspected in Washington till June, 1801, and the terms of the treaty were not accurately known there till November, 1801. Intrigues were already on foot in the inner court circle of the King, and in the diplomatic corps at Madrid, to prevent, or retard, the delivery to France. During all 1801 and into the middle of the next year, the King procrastinated, although he had twice promised to make the cession.

Meanwhile Jefferson was not inactive. Through Dupont he frankly said in April,

1802, to the great Conqueror that from the moment he should take possession of New Orleans, that moment the alliance of the United States and England would be sealed, and "we must marry ourselves to the British fleet and nation." In the next June, France even promised not to alienate Louisiana if Spain would only make the delivery to her, but Spain delayed, and as late as October, 1802, when the right of deposit, secured to the United States by the Spanish treaty of 1795, was suspended by a Spanish subordinate, without the knowledge of the King, Spain was still in possession when news of the withdrawal of the right of deposit spread over the United States intense excitement, and especially over the Southwest, whose producers were shut out from access to the Gulf, since Spain held every river outlet. The party in opposition to the administration demanded war against Spain, or France, or both, for closing the "open door." The assembling of mem-

bers of Congress, most of them ignorant of what the President was endeavoring to do in Paris, Madrid, and London, intensified the popular emotion. The situation was not unlike that which confronted McKinley when Congress met in 1898, but Jefferson's annual message gave one quiet sentence to the topic, and did not indulge in a gush of fervent public spirit.

Jefferson had already submitted to Congress a denial by the Spanish Governor-General of his own responsibility, and that of the King, for suspending the right of deposit, and an intimation that it would be restored, but that assurance did not check the war passion in the Southwest. The House of Representatives quickly voted two millions in aid of the President, and favored the purchase of West Florida and New Orleans. Jefferson, meanwhile, made no other sign than the nomination of Monroe on Jan. 11, 1803, to be minister extraordinary to aid Livingston in Paris and Pinckney

in Madrid, to obtain our rights and interests in the Mississippi. The Senate confirmed the nomination, and on the 13th he started on his mission, taking, as history tells us, elaborate oral as well as written instructions from the President in person.

Did Jefferson when giving those instructions contemplate conditions, in the struggle between France and England for power in the New World, under the stress of which the former would be constrained to drop Louisiana and retire from America? Did he then rely on a rupture of the treaty of Amiens, concluded in March, 1802, which had brought to an end the pending war between France and England? What in the beginning of 1803 could have been Napoleon's plan? He was urging the King of Spain, as we know, to cede to him the Floridas, which by the treaty of 1783 had passed to Spain, but Godoy, the prime minister who suggested the beneficent treaty of 1795, stopped the

way, aided by England. At that time, the French military expedition to Santo Domingo, the essential base of a French movement on New Orleans, had come to grief; its leader, General Leclerc, had died, and French possession of Louisiana seemed hopeless. Why did Napoleon then worry Spain to cede Florida unless he wished to sell it with Louisiana to the United States?

When, in the afternoon of April 11, 1803, Talleyrand startled Livingston with the abrupt question whether or not the United States wished the whole of Louisiana, he answered:

"No; we only want New Orleans and the Floridas."

That evening Monroe arrived in Paris with Jefferson's last instructions, and changed the answer. The treaty of cession was signed in less than three weeks, and within eighteen days France declared another war on England, nominally over Malta, the consequences of

which in Europe and America were tremendous.

As to whether Jefferson's prescience foresaw those consequences is settled by a letter to his friend, Dr. Priestly, only a week before the death of that eminent man of science. He said that he did not expect Napoleon to relinquish Louisiana till war had been renewed between France and England, but till then he hoped "to palliate and endure" in order to avoid war by the United States against France, unless the Federalists and the Southwest forced his hand. He believed a renewal of the war between France and England not far off. It came sooner than he had expected.

By British Orders in Council, French decrees, American embargo and non-intercourse laws, ocean transportation by neutrals was suspended. With the north of Europe at his feet, Napoleon attempted to turn his continental system on England. Losses were inflicted on American ships,

cargoes, and owners almost equal to the sum paid to France for Louisiana. The United States and France nearly came to blows over our reclamation claims, which for thirty years remained unadjusted. The War of 1812 between the United States and England began over the exercise by the latter of search of American vessels, outside her municipal jurisdiction, for seamen alleged by her to be British subjects, and the impressment of them into her men-of-war to fight against France—a practice which General Jackson brought to an end near the New Orleans which France had ceded a dozen years before. That British effort to possess the mouth of the Mississippi was the last made by any European power.

Neither Jackson's victory at New Orleans, nor Wellington's at Waterloo, ended the long colonial duel between France and England over possessions in the American hemisphere. It was renewed when the revolt against Spain by her colonies in

Central and South America was in sight of success, and when at the Congress of Verona, the "Holy Alliance" between Austria, Russia, Prussia, and France permitted the latter to make an armed invasion of Spain, overthrow the Constitution of the Cortes in the interests of absolutism in Europe, and promote French advancement in South and Central America. The United States had recognized the independence of the revolted Spanish colonies, but England hesitated out of fear of European complications. Cuba was in evidence as the first point of conflict between France and England. To thwart the intrigues of France regarding Spanish America, Canning proposed to the United States a "combined" declaration aimed in fact only at France, but in form at the "Holy Alliance," which proposition led up to the declaration by President Monroe of what is now known as his "Doctrine," the chief object of which probably was to keep French influence out of South and

Central America. There was no pretence that Austria, Prussia, or Russia intended going there, but Canning's eyes were securely fixed on French interference with British trade, commerce, and prestige in those regions. Monroe's declaration served the purpose of England and the United States.

The situation had changed some forty years later, for France's reappearance in Mexico under the guise of Maximilian did not make Lord Palmerston unhappy. The Government at Washington, on the other hand, frankly said that it could not permit a French army to suppress an American republic and the second Emperor thereupon withdrew France from her last effort to regain her lost power in the New World. Is any other European government now fixing its covetous eyes on the fertile valleys, unopened mountains, and vast rivers of South America?

During five years, Jefferson held a diplomatic position at Paris, enabling him

there to discern the effect of the New World on the Old. He had seen England expel France from Canada. He was four years as Secretary of State in the watch-tower of our foreign affairs of which the relations between the United States and France constituted a critical part.

He had the qualities of a diplomatist —fertility in expedients; imperiousness one moment and suppleness the next; a facility in playing off antagonists against each other for his own purposes; expertness in changing an inconvenient attitude. He was cheerful, genial, and sanguine, cultivating peace and its methods as his passion. One feels that had he been President in 1898, he would have persuaded Congress to accept the armistice in Cuba so tardily proclaimed, and by diplomatic tact and patience have induced Spain to abandon Cuba to the full sovereignty of the then Spanish subjects in the island.

Whatever opinion she may have held

before he became President, regarding powers "expressed," or "delegated," or "implied," or "reserved," and regarding the relation of the national Government to the internal affairs of the several States, he betrayed, when President, neither doubt nor misgiving respecting his power and duty in *foreign* affairs. His opinions, officially transmitted to Congress, were one thing, but private exhortations to his party were, sometimes, quite another thing. He said that the Federal Government had by the Constitution been divided into two compartments, foreign and domestic; that "the States are independent as to everything within themselves, and united as to everything respecting foreign nations," and that he knew only one instance where a question exclusively between citizens of the same State had been transferred to the "foreign department," and that was legal tender and *ex post facto* legislation. He insisted that commerce should be the chief concern

of the Government in Washington, that "the merchants will manage the better the more they are left free to manage for themselves," and that the desire of foreign powers to possess freedom of access to our ports could always be effectively used as "peaceable coercion."

The urgent prayer of planters and farmers in the Southwest for free access to the Gulf, and for free-trade with Spanish colonies, was sufficient a hundred years ago to stifle the fears of the Virginia school of Democrats lest the Government had, under the Constitution, no right to acquire foreign territory. Spanish resentment against France, and increasing gossip over her defective title to Louisiana, warned Congress to act quickly. Debate over the treaty was perilous in a European aspect. Jefferson never officially intimated to Congress a doubt regarding power to acquire Louisiana.

A very learned man, who participated

conspicuously in the conduct of our public affairs, has somewhere said:

"On the high-road of public life are strewn broadcast the miserable fragments of party doctrines shattered by overstrain like the dead mules and broken-down wagons in the track of an advancing or retreating army. Theories of mathematical precision are good in books of geometry, but not in the conflict of great affairs. Men of action are the masters, not the slaves, of doctrine. What the world needs, demands, and will have is more of practical statesmanship, and less of bigoted exclusiveness of doctrine. He to whom it never happened to think, or know, something to-day, which he did not think, or know, yesterday, must have been born omnisciently infallible, or has not yet advanced from the innocent simplicity and petulant wilfulness of infancy."

Out of the purchase of Louisiana came, in 1820, a statute line of demarcation between free labor and slave labor, known

as the "Missouri Compromise," and out of the latter came, finally, the subsidence of the Whig party, a declaration in 1857, by six out of the nine justices of the Supreme Court, that the line had been unconstitutional, null and void from the beginning, a temporary disruption in 1860 of the Democratic party, and then the war of secession. The statutory line was advocated by one political school, was resisted by the other which afterwards crossed over to the opposite side, was then abandoned by its first advocates, and, in the end, was generally discredited by both schools.

The Federalist opponents of the Louisiana treaty, abandoning their earlier contentions when the Jay treaty was pending and making a call for executive papers, went over in 1803 to the place occupied by Democrats in 1796.

Those who voted against the Louisiana treaty condemned the articles stipulating that the inhabitants be incorporated into

the Union "as soon as possible, according to the *principles* of the Federal Constitution," and conceding to France and Spain free-trade for twelve years in the ports of Louisiana.

The United States had no officials in the new territory, which was not occupied, in any part, *by our army,* as Porto Rico and Manila were occupied on the completion of the recent Spanish treaty. The Government was inexperienced in such work. The Supreme Court had not explored and adjudicated questions relating to it.

Marshall had not begun those luminous expositions discriminating between that part of the old order which may remain and be utilized by a State acquiring settled communities from another State and that part which must disappear because inconsistent with the political institutions of the acquiring State of which, in the case of the United States, the Constitution is the supreme

test and therefore must, in the nature of things, be immediately applicable to every acquisition. But within a week after the treaty had been ratified, a law was enacted enabling the President to take a delivery of Louisiana from France and govern it till the end of the Congress then in session. It was an emergency enactment.

It vested in persons to be appointed by him all the military, civil, and judicial *powers*, exercised by the officers of the ceded province, and required him to direct the manner of exercising such powers "for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property, and religion."

Congress thereby enacted, in effect, that the former Spanish and French laws, excepting always and of course those forbidden by our Constitution, shall be the laws of the new acquisition till Congress made others. Jefferson was commanded

to supervise the execution of the enactment. The Federalists denounced the measure as an unconstitutional delegation of legislative power, probably on the assumption that "all civil powers" included power to make laws. It was replied that Louisiana was not yet a State. Randolph pleaded an urgent necessity for immediate legislation of some sort, and challenged the opposition to propose anything better. Rodney, of Delaware, afterwards Jefferson's Attorney-General and the first Democratic Senator in Congress from that State, argued that, under then existing statutes, the Governor, the Secretary of State, and the judges appointed by the President could make laws in a territory.

Repudiating the theory of constitutional law contended for by Federalists in 1803, there was in March, 1901, inserted in the pending army bill an amendment, popularly known as "The Spooner Amendment," which repeated in an enlarged way

the imputed unconstitutionality of the emergency statute of 1803, by placing "all military, civil, and judicial powers, *necessary to govern the Philippines,* until otherwise provided by Congress, in such person and persons, and to be exercised in such manner, *as the President shall direct.*"

All civil powers necessary to govern the Philippines!

In that sense, the law of 1901 goes beyond that of 1803. The character and magnitude of the new departure since the war of invasion of Cuba can be discerned in the difference between the two laws. The former confined Jefferson to the execution of existing and known ordinances and decrees, but the latter covered the whole field of "establishment of civil government" in the Philippines which Governor Taft is now exploiting, and did not enact any rule whatever for the archipelago. It attempted to give to McKinley full power to legislate, a power

not imparted to Jefferson. It made McKinley's unrestrained will (the Administration contention is that the Constitution is impotent to control in an unincorporated territory) the basis of legislative power in the Philippines.

During the period between the Jay treaty with Great Britain and 1901, there has been much crossing over by members of each of the political parties and a vigorous exchanging of partners, under the stress of problems presented by the acquisition of foreign territory. There have been indications, since the expansion of the Government into the far East began, that the casual remarks on the bench, and even the decisions of the illustrious Marshall, have not the infallible authority accorded to them before the war against Spain.

CHAPTER II

SIX years after the Louisiana debate and legislation, the Supreme Court availed itself of the clear intelligence and exceptional faculty of vivid exposition possessed by its illustrious Chief-Justice to remove the confusion of ideas, regarding the acquisition and government of foreign territory and its inhabitants, which the friends and foes alike of Jefferson's administration had promoted. Marshall, in behalf of all his associates, declared that "the power of governing and of legislating for a territory is the inevitable consequence of right to acquire and hold territory," or if that position could be contested there is the "needful rules and regulations" clause of the Constitution, and that Congress

had accordingly exercised "the absolute and undisputed power of governing and legislating for the territory of Orleans." He seems to have been inclined to put the right of Congress on an implied power. In a subsequent case he reaffirmed the decision, and thus the right was in that forum placed beyond debate.

In the Louisiana controversy, it had been argued by those of Jefferson's school that the new territory was not "a part" of the United States. Seventeen years afterwards, however, the Supreme Court defined the phrase "throughout the United States" as covering "our great republic composed of States *and* Territories."

Immediately after the contents of the recent Spanish treaty had been made public, that opinion in *Loughborough vs. Blake* was in Administration circles an object of intense interest and even aversion. The criticism of Chief-Justice Marshall's opinion, during the last two years and more, reminds one of that

which forty years ago befell Chief-Justice Taney's opinion in the *Dred Scott* case. The Government, in its argument in the insular litigation, described all that Marshall said in the former case as illogical *dictum,* excepting so much as decided that Congress could lay a direct tax in the District of Columbia.

Many times has the Supreme Court adjudged that to a political subdivision of the United States, which is not a State in the Union but is a territory, the Constitution has not imparted the absolute right of self-government; that its officers need not be chosen by its voters; that Congress can veto territorial legislation, or, in a word, that the territory has not sovereignty. Some lawyers deny constitutional guarantees to a territory. Others insist that a treaty of cession can take all away. And yet the question whether or not Congress, when legislating for the people of a territory, has arbitrary power, unrestrained by the letter of the

Constitution, remains to be definitely decided by the courts so as to be beyond controversy.

In each of our four earliest treaties of acquisition, the United States covenanted and agreed to give certain specified rights, immunities, and privileges to the inhabitants, but that with Russia made no mention of the admission of Alaska into the Union as a State and omitted "uncivilized native tribes" from the specified enjoyments conferred. The treaties with France, Spain (1819), and Mexico differ in regard to the *time* of incorporating the inhabitants into the Union—the first stipulating "as soon as possible," the second engaging to incorporate "as soon as may be consistent with the principles," etc., and the third contracting to admit into the Union "at the proper time to be judged of by Congress," but all solemnly undertake that the inhabitants shall have the specified enjoyments of citizens. What would have been their condition

under the Constitution, without such stipulation of inclusion, the Supreme Court has not decided.

The difference between those treaties and the last one with Spain is such that it must have been intentional on the part of our negotiators, and made with a purpose to exclude, if possible, the inhabitants of Porto Rico and the Philippines from civil rights and citizenship until Congress had legislated. Was the intention unsuspected by those who ratified the treaty? The Chief-Justice, in his dissenting opinion in the recent *Downes* case, concurred in by Justices Harlan, Brewer, and Peckham, said he did not in the least degree intimate the unconstitutionality of the last clause of the ninth article of the treaty of 1898. He added that it contained only a recognized principle of public law; that it did not increase, or diminish, the rightful power of Congress, or the force of the Constitution. No article of any treaty could do that, or

if it did make the attempt, the particular article would be null and void.

Many who have not had the opportunity or inclination to study the pleadings and issues may well be surprised that in order to decide four revenue suits and one pilotage suit, there should have been so much argument, such unusual delay of decision after the arguments had come to an end, and that the opinions of the majority of the court, excepting those relating to duties collected before complete cession and to coastwise trade, were so out of harmony with each other. None of the controlling facts were in dispute. Only two or three questions of law were in contest. One was the definition of "foreign countries"; another was the effect of the treaty upon the Dingley tariff in its application to merchandise from Porto Rico, and a third was the definition of the phrase "throughout the United States." Those questions do not seem, on first view, difficult to

answer, but if the length and bulk of the arguments and opinions are a test they were very perplexing. An indication of how deeply into current partisan politics the insular cases penetrated is in the unusual order by Congress, in February last, to print all the records, briefs, and arguments by counsel therein, which make a large volume of nearly 1100 pages. The opinions of the Justices fill 166 closely printed octavo pages, containing nearly 93,000 words, and two-thirds of all is occupied by the *Downes* case, which presented the constitutionality of the Foraker law. The huge bulk shows how small a part of the opinions could be published by newspapers on the morning after announcement of the decisions. It will be difficult for any commentator to ever blaze a clear pathway through the thickets of executive, judicial, legislative, and historical precedents that the counsel and the court encountered.

The first of the custom-house exactions

put in suit was in the *Goetze* case. The tobacco arrived in New York from Porto Rico early in June, 1899, two months after the proclamation and official publication of cession of the island. The Collector of the port of New York, not having received from the Treasury Department special orders, naturally levied and exacted duties under the Dingley tariff, as he had all along done. The importers protested that the tobacco was exempt from duty by reason of the officially proclaimed treaty of cession repealing, in that regard, the Dingley law. The protest went before the Board of General Appraisers which, assuming a jurisdiction that it did not possess, gave an opinion, unusually elaborate in such cases, on intricate and delicate questions of international, constitutional, and tariff law, the theories and conclusions of which were followed by the Federal Judge for the Southern District of New York to whom the protest went on appeal. In

the elaborate arguments before the Supreme Court against the importers, by the Department of Justice representing the Government, the identity between those arguments and the opinion of the custom-house appraisers suggests a common origin. The issue in the *Goetze* case could not involve the then unenacted Foraker law. It only presented the question whether or not Porto Rico was, after the cession, a "foreign" island within the true interpretation of the Dingley law. Those who paid the duty said it was not foreign. The Treasury Department said it was foreign, and the court below sustained the Treasury.

The only adjudged case cited against the importers was that of *Fleming vs. Page* in 1850, which merely decided that Tampico, having been only occupied in war, and unacquired by treaty cession, was a "foreign" port. The court remarked that no acquired place could be a domestic customs port till expressly

made such by Congress, and a Collector appointed. That *remark* became controlling in the insular cases, as will be seen later on. The customs' appraisers vaguely broached a novel difference, afterwards openly pressed by the Attorney-General upon the Supreme Court, between an international and a constitutional acquisition of foreign territory, and on that difference the last-named officer endeavored to get rid of the decision of the Supreme Court in *Loughborough vs. Blake.* Thus the controversy widened.

Under the belief that the latest Spanish treaty of cession was in legal effect not unlike the French and Mexican treaties of cession the counsel for the importers argued confidently that Porto Rico became by the cession immediately "a part" of the United States to be governed under the applicable clauses of the Constitution, and that its ports and its products were on an instant equality with the other ports and products of our country.

It is not obvious why it was necessary, or expedient, to begin a contention over citizenship under the stipulations of the last clause of the ninth article of the treaty ceding Porto Rico. The Chief-Justice wisely remarked in his dissenting opinion in the *Downes* case: "It will be time enough to seek a ford when, if ever, we are brought to the stream."

The general theory of our tariff law is and always has been that customs officers take into their custody all imports so soon as they come within our territorial limits, and retain possession until lawful duties and charges on them have been paid. Who can claim and make a custom-house entry of the import is described in the customs laws, which pay no attention to the personality of the shipper, or the claimant, of the arriving merchandise, whether he be a citizen or alien, friend or foe. The tax is *in rem* and not *in personam,* and as to the *rem* the law only seeks to ascertain the character,

quality, commercial description of the merchandise, and the place or port of shipment to the United States. Under normal conditions the elaborate argument and disquisition at the bar as well as in the opinions of the Justices, regarding the character and quality of the *inhabitants* of our newly acquired islands would be irrelevant, inasmuch as the only question would be whether or not the place from which the merchandise came was "foreign."

It is not probable that Spain will take very lively interest in anything the United States may do to the native inhabitants under the last clause of the ninth article, or under any other article of the treaty, excepting possibly the fourth, which contains a promise by the United States to Spain that she shall during ten years have free-trade with the ceded islands. If, however, Congress shall enact that duties be levied in violation of the article, or if for any other reason it shall be disregarded, the cession of the islands will not be affected.

Were the interpretation of the last clause of the ninth article to be submitted to arbitration, because of differences arising between the United States on the one side and either Spain or the "inhabitants" on the other side, an international tribunal would probably decide that the determination by Congress of "civil rights and political status" is to be what the fundamental law of the United States and not any other law requires, and that if such determination shall be in conformity therewith, the decision of Congress is final and conclusive.

In the *Goetze* case the court decided that the sole question was whether Porto Rico and the Hawaiian Islands were "foreign" countries. The Board of General Appraisers had no jurisdiction, for the reasons stated in the *De Lima* case, where it was adjudged by five Justices (Gray, McKenna, Shiras, and White dissenting) that duties levied at the port of New York under the Dingley law, and before enact-

ment of the Foraker law, on sugars imported from Porto Rico, were unlawfully exacted.

In the *De Lima* case a majority of the court decided (what the majority determined in this case is as much law as that which the majority decided in the *Downes* case) that sovereignty is a test whether territory is foreign or domestic; that by ratification of the treaty of Paris, Porto Rico became domestic territory of the United States; that a law of Congress establishing a custom-house in Porto Rico and appointing a Collector was not needed to make it domestic territory; that a country ceded to and in possession of the United States ceased to be foreign, and therefore the duties levied under the Dingley law were unlawfully exacted.

A minority of the Justices dissented because sovereignty is not the sole test in a revenue sense, for inasmuch as that test "takes this great country out of the world, and shuts it up within itself,

. . . if our Constitution and laws immediately apply on cession of territory;" because when the shipment was made, Porto Rico occupied an undefined and unincorporated relation to the United States somewhere betwixt foreign and domestic, and because a decision that the *De Lima* duties were legally levied "vindicates the Government from national and international weakness."

The *Downes* case presented only one question, which was whether or not the Foraker law was forbidden by the first clause of the eighth section of the first article of the Constitution. Five Justices said it was forbidden and four said it was not. Justice Brown, forsaking his associates in the *De Lima* case, and crossing over to the minority, made a majority in the *Downes* case, the judgment of the court in which, as in all the insular cases, he pronounced. He began a statement of reasons for the judgment by saying that in the *De Lima* case the sole ques-

tion was whether or not Porto Rico was "foreign"; but now in the *Downes* case the question is whether or not the island was "a part of the United States" at the date of the shipment. It being his opinion that the island was sufficiently "foreign" to avoid the Dingley law, but not sufficiently "foreign" to escape the Foraker law, the Chief-Justice, and Harlan, Brewer, and Peckham left him.

Justice Brown affirmed that Porto Rico is only "appurtenant and belonging to the United States, but not a *part* of the United States within the revenue clauses of the Constitution." He seemed also to think (it is not quite clear) that no territory has ever been "a part" of the United States. He declared that neither the Constitution, nor revenue laws of the United States enacted before the cession of Porto Rico, extended over the island *ex proprio vigore*; that Congress when legislating for Porto Rico was not restrained by the Constitution excepting when, and

so far as, Congress restrained itself (he conceded that the judicial decisions have not been harmonious), but that after Congress has extended the Constitution over an acquired territory the extension cannot be withdrawn and Congress is forever bound by it.

Towards the close of Justice Brown's opinion on the Foraker law, he dwelt on the serious question as to whether children born in the Philippines after the cession are entitled to all the rights, privileges, and immunities of citizens. He commented on the difference between continental accretion by annexing contiguous foreign territory as Jefferson did in 1803, and annexing "distant possessions" as McKinley did in 1898, and concluded that the Philippines, having been acquired, *concessions* ought to be made by the court, because in the archipelago "administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible." If world-

wide commerce requires world-wide power in the sense of military stations, naval stations, and self-feeding military provinces all over the world, to be governed as a military post, or a battle-ship, one naturally thinks the proper course would be to amend our fundamental law in a way to recognize and provide for the new necessity. If the Government at Washington really needs as much sovereignty for work in Asia as that possessed by Russia, or China, or Japan, what valid reason is there why the people of the States should not surrender it?

Justice White, who, with Justices Gray, Shiras, and McKenna, dissented from the reasons given by Justice Brown, but not from the judgment ordered, based his formidable opinion on the declaration that the legality of the levy under the Foraker law depended on whether or not Porto Rico had, when that law was enacted, "been *incorporated* into and become *an integral part* of the United States."

He vindicated the right of our Government to acquire foreign territory, but denied that the treaty-making power can *incorporate* acquired territory into the United States without the assent of Congress. He declared that a treaty may forbid, or may promise, incorporation, and in the latter case Congress will be bound, but the recent treaty did not promise incorporation.

He asserted that in creating *local* governments for the new islands, the *discretion* Congress has under the Constitution is not restrained by expressed limitations, but there may nevertheless be "unexpressed *principles,* which are the basis of free government," and must be regarded, although he did not affirm that the court should so apply those "principles" as to annul conflicting statutes. The Foraker law did not, however, as he thought, lay a local tax, inasmuch as the Foraker duties were laid in New York on merchandise from Porto

Rico, and, therefore, he conceded that if that island was a part of the United States, the duty was repugnant to the Constitution, because not uniform. That was an admission that the Constitution controls. He filled many pages with demonstration of the power of the government to acquire foreign territory through the treaty-making branch consisting of the President and two-thirds of the Senators present when ratification is in order, but he foresaw disaster if the treaty-making power can make an acquisition "a part" of the United States without the co-operation, in the form of a statute, of a majority of the House of Representatives. Mere acquiescence, as by voting the purchase money, he thought insufficient. He vigorously denied, and gave reasons for his denial, that the treaty-making power is competent to absolutely incorporate acquired territory into the United States. His arguments, which were those of a third of the court, based on the repelling

character of the inhabitants of the Philippines, are as serious as they were startling. His premise, never abandoned or lost sight of throughout his elaborated opinion, is that the treaty-making power cannot incorporate foreign territory into the United States without the assent of Congress; and that neither the recent treaty, nor the Foraker law, incorporated Porto Rico.

It is to be regretted that Justice White did not at the outset clearly define the sense in which he employed the phrases "incorporated into the United States," and "a part of the United States," because there is much in his opinion to indicate that he did not mean Statehood, but a territorial status such as the Northwest territories had when the Constitution was framed and as New Mexico now has, and yet there are sentences which compel the reader to pause and ask whether or not membership of the Union of States is intended. He claimed that the promises

by the United States in Jefferson's Louisiana treaty did not refer to Statehood, but to incorporation as territory, and that when the Constitution was adopted, the then existing "territories" were "a part" of the United States which did not then consist only of States, and that such was the conception of Jefferson and Madison. His contention upheld the opinion in *Loughborough vs. Blake,* which the Attorney-General depreciated in his argument as "a moot case" and because much of what the court had uttered was *dictum.* Justices White, Shiras, and McKenna sternly contradicted those who have affirmed that "The United States of America" did not comprise territories at the time of the adoption of the Constitution, and has not at any time since comprised them.

The chain of reasoning by which Justice White reached the conclusion that the Government cannot alienate, or give independence to the Philippines, after in-

corporation is illuminating in many directions, and should be interesting to those who advocated ratification of the treaty as the best way of resisting imperialism, the colonial policy of the McKinley Administration, and the securing a government of the Philippines "according to American principles."

Among the most striking of Justice White's many striking utterances is that part of his opinion in which he referred to those who are sensitive over a government by Congress in defiance of the applicable commands of the Constitution, but do not wince under a prolonged rule by the military arm after the cession or the end of war, in which rule there is no pretence of a Republican government. He could not comprehend how a Democracy is willing, in time of peace, to tolerate violation of the Constitution by the military arm, but is unwilling to tolerate violation by the civil arm, the war power and legislative power being both creat-

ures of the Constitution and subject thereto.

Even more striking is the sentence implying that the Government ought never to incorporate islands it does not really intend to permanently hold, but should "when the unfitness of particular territory for incorporation is demonstrated" terminate the occupation. He declared that "the pledges made to an alien people" cannot be more sacred than that great pledge by every officer of the Government, executive, legislative, and judicial, "to support and defend the Constitution."

Justice Gray read a short, concise, and clear opinion in the *Downes* case indicating his "position," as he said, "in the other cases now standing for judgment." He began by affirming that none of the cases touched the continental territories existing before the Spanish war. He made a distinction between "the territories" and "territory." He cited Chief-Justice Mar-

shall's remark that if a conquered territory be ceded by treaty, it becomes either on the terms stipulated in the treaty of cession, or on such as its new master shall impose, "*a part* of the nation to which it is annexed." He said that civil government over acquired territory does not begin immediately, but there is "a transition period." Making such civil government is the business of Congress. He affirmed that till Congress has legislated, the levy of customs duties in the acquired territory, even after cession, remains in the hands of the military executive power, but he did not say that such executive power can after cession so far be a legislator as to change rates of duty existing in the territory when ceded. He declared that till Congress has "incorporated" the acquired territory, it is not "domestic" in a revenue sense, but did not say whether or not the incorporation must be into the Union as a State. His opinion was that till Congress shall

be ready to construct a complete government, Congress may establish a "temporary" one, not subject to "*all* the restrictions of the Constitution," but he did not say whether or not Congress in enacting the temporary government will be subject to *any* restrictions.

Justice White had explained why the court ought never to invade the domain of legislative discretion. He said the treatment of Cuba, under the treaty, shows that the United States can, by its military arm, hold, as long as it pleases, the sovereignty of a foreign country and rule it, and therefore can in the exercise of its discretion accept and hold by its military arm territory never to be incorporated. If the court were to deny the right of the civil power thus to hold territory in disregard of the Constitution, the political department could "whip the devil round the stump" by putting the acquisition under the military arm as in the case of Cuba.

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Justice Brown, although approaching from another side the existing dilemma created by purchasing alien races unfit for incorporation, was none the less startling. He was confident that the framers of the Constitution never foresaw the present problem; that they only thought of governing territories then existing (if the Constitution did not permit the acquisition of the new islands and their government, then obviously the court was making a new Constitution and interpreting its own work), or if others were in contemplation there was no limitation put on the power of Congress to govern them; that, therefore, the court cannot interfere with what the President or Congress may do in the new islands; that the Philippine archipelago is to be dealt with "upon its merits," and the judicial power should "throw down the reins" and descend from the judicial box while the new experiment is under way.

Perhaps that is true, and is now the law

of the land, and there is no other exit from the *cul de sac*. Much in the opinions in the *Downes* case indicates it. Justice Harlan, however, resented the suggestion that the case of Cuba warranted such inference as was drawn by Justice White. The island has had such an exceptional and eccentric manipulation from the time Congress, as justification of war against Spain, declared it to be "free and independent," that there will be no end of possible inferences from its career.

The Chief-Justice, having with him in each phase of the insular cases Justices Harlan, Brewer, and Peckham—it is worthy of mention here that the Chief-Justice and Justice Peckham were appointed by Cleveland, Justice Harlan by Hayes, and Justice Brewer by Harrison—began the dissenting opinion in the *Downes* case by declaring that he and his three associates were unable to concur in the opinions and judgment of the court in that case,

the issue in which he described to be whether the Foraker law, so far as it required as a condition of entry into other ports of the United States the payment of duties on merchandise brought from a port of Porto Rico is consistent with the Federal Constitution. He challenged the statement of the majority that the inquiry is whether or not Porto Rico, at the time of enactment of the Foraker law, had "been incorporated into, and become a part of, the United States," and declared the question to be whether or not Porto Rico, having been organized as a territory by the Foraker law, Congress could by the same law, and in exercise of the power confirmed by the first clause of section eight of the Constitution, impose duties on *commerce* between Porto Rico and the States and other territories than Porto Rico, "in contravention of the rule of uniformity qualifying the power." He alluded to the position taken by the Attorney-General that "the power of Con-

gress over commerce, between the States and any of the territories, is not restricted by the Constitution," and to the "great stress" thrown by the majority in their opinion "upon the word *incorporation*, as if it contained some occult meaning." Having declared the Foraker law invalid, he commented on several side issues, and for the reason, perhaps, that all the other Justices had discussed them. He considered the question whether or not the power of the Government over a territory, as distinct from commerce between it and a State or other territory, is unrestricted under the Constitution. He repelled the intimation that the court will tolerate the pretension of possession of unrestricted government authority over territory merely in order that vast possessions remote from Washington may be governed.

He denied that Porto Rico could be kept for an indefinite period "like a disembodied shade," and then on emer-

ging therefrom, the commerce between it and New York be subject to a power in Congress unrestrained by the Constitution. He repudiated utterly the pretension that an article arriving from Alaska into the port of New York can be exempt from duty, and a similar article from Porto Rico can be dutiable. The cession of Porto Rico is an accomplished fact, but the treaty did not, and could not, either enlarge, or diminish, the power of Congress under the Constitution. An article in the treaty of cession attempting it would be null and void, but not the article of cession. He fought for the integrity and binding force of the many pertinent decisions by the court announced by his illustrious predecessor in the office of Chief-Justice. He declared the United States to be a nation in international affairs, the ninth article of the Spanish treaty to be constitutional, but the Foraker law to be unconstitutional, so far as it levied duties on articles arriving

at New York from a collection district and port in Porto Rico created by that law.

The dissenting opinion read by Justice Harlan in the *Downes* case is an eloquent exhortation in behalf of the opinion read by the Chief-Justice. Probably the archives of the court do not contain a more vigorous vindication of the truth that the Constitution has created a *government* capable of acquiring foreign territories and ruling over them, but yet a government whose every power, at home or abroad, in territories or in States, and the power of every one of its agents, military or civil, is measured and always tethered by that Constitution. He united with the Chief-Justice and his associates, Brewer and Peckham, in timely denunciation of the modern conception that when discussing the right of our Government to do this or that, it is relevant to show what the government of Russia, or France, or Germany, or England, or some other government can do. He lifted a vigorous

arm against the novelty that the law of nations has been so incorporated into our Constitution that the agreement of other nations with one another, for a new rule of public law, can make it a part of our Constitution. He condemned the Foraker duties as unconstitutional because the Foraker statute had enacted a territorial government for Porto Rico and had recognized custom-house ports of entry therein, but he did not say whether or not in his opinion Porto Rico became, by the ratification of the recent treaty, such a part of the United States as New Mexico is.

What has the Supreme Court adjudged in the insular cases? It is this: After Porto Rico was conquered and before it was acquired by cession, the military executive power could levy there any duties it deemed proper; after the acquisition and before the enactment of the Foraker law, the levy of duties at New York under the Dingley law on merchan-

dise from Porto Rico, and the levy by military officers in Porto Rico on merchandise arriving there from the United States, were illegal; under the Foraker law the duties laid on merchandise from Porto Rico to New York were lawfully levied at that port, and yet under the Foraker law commerce between Portó Rico and New York was and is coastwise.

Those judgments left undetermined the *Pepke* case, where the record shows that a soldier bought in Luzon fourteen diamond rings; that he was ordered to San Francisco in a Government transport; that on arriving there, as a soldier under orders and not as an importer, he did not declare the rings as dutiable, even if ever asked whether he had dutiable articles to declare; that he went to Chicago where the rings were seized by the customs' authorities, libelled for forfeiture because imported with intent to avoid payment of duty under the Dingley law; that Pepke filed a claim and answer setting forth

the facts, and the Government filed a demurrer which the court sustained. The proceeding is therefore for forfeiture of the rings on the ground that the Dingley law made them dutiable after the cession of the Philippines, as was claimed in effect by the Government in the *De Lima* case, and that Pepke intended to evade duties.

In the *De Lima* case, Justice McKenna, uttering the conceptions of himself, Shiras, and White on the Dingley question, and having wrestled cleverly with the troublesome case of *Cross vs. Harrison,* concluded that the Spanish treaty did not make the status of the new islands identical with that of our other territories. He said: "*The difference in the treaties* removes *Cross vs. Harrison* as a factor in the judgment of the case at bar, supposing its interpretation, in the opinion we are reveiwing, be correct."

Justice Gray expressed his belief that the cases "before the court did not touch

the authority of the United States over *the territories,* in the strict and technical sense, being those which lie within the United States, . . . but they relate to *territory,* in the broader sense, acquired by the United States through war with a foreign state."

In the view taken by five of the Justices —Gray, Brown, White, Shiras, and McKenna—the political division of our country, excluding of course Indian reservations, since the acquisition of our new islands, is into (1) States, (2) territories, and (3) insular possessions,—the second class incorporated perhaps, but the third not incorporated.

After the Virginia and Kentucky resolutions of 1798 and the case of *McColloch vs. Maryland,* there was long and fierce debate over the relation of the Federal Government to the States, and after the acquisition of Louisiana came a long and fierce debate over the relation of the Federal Government to the terri-

tories, which led up to the war of secession and the Thirteenth Amendment of the Constitution. Is there to be protracted and exasperating partisan dispute over the relation of the Government at Washington to our insular possessions?

CHAPTER III

THE opinions of the five, who may, for brevity of description, be referred to as the Administration members of the court who upheld the Foraker law on the plea that Porto Rico was not then embraced in the phrase "throughout the United States," seem to have been influenced by a wish to make judicial *concessions* in order to aid in the control of distant possessions, "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, the administration of government and justice."

Ever since the Supreme Court asked, in *Marbury vs. Madison*, "to what purpose are powers limited, and to what purpose is that limitation committed to writing," good men have predicted that eventually

the shackles of our written Constitution will be evaded, or broken, and an omnipotent Congress will appear in Washington imitating an omnipotent Parliament in London. However improbable that may be, the decision that Porto Rico is not a part of the United States is the law of the land, and why shall not the President and his good men, the War Department and its good men, be implicitly trusted "to govern our new possessions" (as the recent Ohio Republican platform puts it) "according to the needs of their own people, and in the interest of the people of the United States?" It is Constitutional truth that popular sovereignty and home rule do not exist in any territory of ours, incorporated or unincorporated, unless by permission of a Federal statute. Why go through the formality of Congressional commitment of everything to the President as in the Spooner amendment to an army bill? The line of division between

executive and legislative powers may sometimes be difficult to discover, but yet the division was once very precious.

What is the source of the power of the President to govern Porto Rico and the Philippines in time of peace? The court decided in the *Dooley* case that "the right of the Collector of New York to exact duties upon imports from that island (Porto Rico) ceased with the exchange of ratifications of the treaty," but, nevertheless, the President has the right to govern Porto Rico till prohibitory action by Congress.

The Constitution is silent regarding executive power so vast. The President is, as we all know, always "commander-in-chief" of the army and navy, whether in peace or war, but the Constitution does not confer on him the power to make laws in time of peace.

It does not define war, and therefore the President turns to a law of nations for the usages of war, but it is not obvious

to one's ordinary reasoning perceptions how the President, after he had subdued Spain, obtained the object of the war, and peace had come by a treaty, acquired from the war a right to make laws for the territories and the millions of people ceded by the treaty.

In the "Prize Cases," growing out of the war of secession, a majority of a divided Supreme Court decided, in the face of strong dissent by the minority, that a special law enacted by Congress was not necessary to enable the President, in case of civil war or insurrection, to exercise the belligerent powers of blockade and capture enemy's property. The reasoning used by the majority may apply to sudden, or threatened, invasion by a foreign government, if the executive shall deem the circumstances such as require application of armed force without awaiting special authority from the legislative power as in the case of the Mexican War, but the Supreme Court has not yet

said that the President can, after completed conquest and cession of foreign soil and peoples, and without the special authority of Congress, or even by virtue of an enactment to that effect, make such new *laws* as he may be pleased to ordain for the new acquisition.

Justice White began his opinion in the *Downes* case by this clear exhibition of the main issue:

"On the one hand, it is affirmed that although Porto Rico had been ceded by the treaty with Spain to the United States, the cession had been accompanied by such conditions as prevented that island from becoming an integral part of the United States, at least temporarily and until Congress had so determined. On the other hand, it is insisted that by the fact of cession to the United States, irrespective of any conditions found in the treaty, Porto Rico became a part of the United States and was incorporated into it."

He mentioned the law of nations as possibly giving the power of legislation to the President, but why is international law either pertinent, or relevant, on the matter any more than it was in the decision by our Government to intervene by force in the internal affairs of Cuba, or in the Paris negotiations for peace, or in the demand that Spain cede the Philippines? The Constitution imparted to the Government it created the power to make war against Spain, a treaty with Spain, and acquisition of territory from Spain. The law of nations did not forbid it, and could not prevent it. Treaties, if there be enough of them, may contain evidence of a law of nations, but that law cannot modify, or interpret, a treaty between the United States and Spain, or prescribe what the United States may do as an independent and sovereign state, so as to enlarge the authority imparted to the President by the Constitution. Until another nation,

or a combination of other nations, shall be powerful enough to successfully intervene in our internal affairs as we intervened three years ago in the affairs of Spain, and dictate in what manner the Philippines shall be governed, as we dictated regarding Cuba, the invoking of a law of nations as decisive of the pending inquiry is impertinent and irrelevant.

International law is a vague and varying code somewhat modified on paper since Admiral Cochrane, the British commander on the American station, avowed his purpose in the War of 1812, to employ the force under his orders "in destroying and laying waste such towns and districts upon the coast as may be found assailable," under the pretext of retaliation for destruction of a few sheds by the American army in Canada. He did put the torch to valuable public buildings in Washington. But the usages of war have not been much modified in actual practice, as Weylerism in Cuba, that which

is now going on in South Africa, and recently went on in China show clearly enough. That practice in South Africa and China is a grim commentary on Articles 47 and 50 promulgated only a little while before by the Hague Conference.

In 1855, the London Foreign Office insisted that Great Britain was entitled by international law to use the territory of the United States as a recruiting-ground, whereon her diplomatic, consular, and other agents could entice and pay men to go to Nova Scotia and there enlist in the British Army for service in the Crimean War, but sixteen years later she conceded by *The Treaty of Washington* that a neutral government is bound to prevent in its jurisdiction the recruitment of men by either belligerent. Can it be that such a mutable code is a part of our immutable written Constitution—immutable unless modified as therein prescribed?

The argument of one political school runs somewhat thus:

The *people* of the United States constitute a Nation, with all the rights, powers, and duties which, by international law, belong to a Nation, and are one of the family of nations. That the other political school maintains.

The present law of nations is, and that of next year will be, however unlike that of the previous year, a part of the Constitution. That is denied by the other political school.

Therefore, the Government of the United States and its treaty-making power can, under the existing Constitution, do all in foreign affairs that the government of any other nation can do.

And yet with singular inconsistency the first-named school deny that the treaty-making power of the United States can, under the existing Constitution, make a State of the Union out of foreign territory. The United States is not enough of a Nation for that!

It has not yet been asserted by anybody

that the President may even in war, much less in peace, exercise authority not conceded to the Government of the United States, or authority exclusively conferred on Congress.

Before the Mexican War the Government had no experience in ruling by military power, under the control of the President as Commander-in-chief, places conquered from an enemy, or territory ceded. The acquisitions of Louisiana, Florida, and Texas were peaceful, and the few days between their delivery and a government created by Congress did not permit the President to thrust in his military arm, even had he desired to do it.

Justice White pleads in the *Dooley* and *Downes* cases, that the harmonious working of our Government may be destroyed if there is not a protracted transition period between ratification of a treaty of cession confirming conquest and the beginning of civil government over the

acquisition. The theory is that Congress cannot be, and ought not to be expected to be, ready with needed legislation so soon as a treaty has been ratified, and therefore the new acquisition must for a while be in military hands.

A long intervening period after the Mexican and Spanish cessions makes the theory plausible, but the interval was brief after the cessions of Louisiana, Florida, and Texas. The cause of the delay in legislation by Congress was not normal in the case of California, for the slavery problem created a dead-lock between the two Houses of Congress, the Senate being in the hands of Democrats, and the other House being controlled by Whigs who had, in the middle of the Mexican War, ousted the Democrats and made Winthrop, of Massachusetts, Speaker. In the case of the Philippines, Congress was not convened as soon as the cession was complete, and when the legislative branch did assemble it was deemed pru-

dent, by reason of exceptional ignorance regarding the new acquisition, to leave it in executive hands till at least a military reconnoissance in force had been made. All branches of the Government were, in 1899, in the firm possession of the same political party, and there was not a blockade against territorial legislation as in the California case.

President Polk made no delay in soliciting and urging Congress to enact territorial governments for California and New Mexico. Only two days after the treaty of cession and peace with Mexico had been proclaimed, he laid the treaty before Congress, accompanied by a special message informing the body that the acquisitions "now constitute *a part* of the United States," and that "the power of the executive to establish, or to continue, temporary civil governments over those territories . . . has ceased." In his next annual message he somewhat modified the statement so as to

declare that the temporary governments, which had been established "by virtue of the rights of war, ceased to derive any obligation from *that source* of authority." He implored Congress to legislate.

The Whig opposition in Congress to the Polk Administration and the war against Mexico was alert, vigorous, and unrelenting from the beginning. The annexation of Texas stirred up against the Administration a virulent hostility.

A speech in Congress in 1847, made by the genial and brilliant Whig Senator from Ohio, Mr. Corwin, probably interpreted correctly, with the exception of one bitter and cruel sentence which has gone into history, the intense hostility of the Whig party to the annexation of Texas, the Mexican War, and the resulting annexations of Mexican territory under Polk in 1848, and Pierce in 1853. If the executive chiefs of the present Government, who accompanied the President in his recent journey from

Washington to San Francisco, were inspired to take an historical and party retrospect as they were borne along from Memphis through Louisiana, Texas, New Mexico, Arizona, Nevada, and California, and then homeward through Utah, Colorado, Wyoming, Kansas, and Missouri, and the flourishing cities where the President paused to greet his countrymen and congratulate them on the happy homes that were theirs—those Cabinet Ministers must have meditated, and spoken with one another, on the historic fact that all of those great States, so boundless in capabilities under the hand of man, have already been potent instruments in accomplishing tremendous industrial and financial changes not only in the United States, but in the mutual business and competitive relations between the old world and the new. Those high executive officers must also have recalled to mind how Jefferson, Tyler, Polk, and Pierce were criticised and reproached

for the policy which added to the domain of the United States the vast regions west of the Mississippi and to the exclusion of England, secured the ports on the Pacific which look out upon Hawaii, the Philippines, and the far East.

As early as the middle of December, 1846, Congress adopted a partisan resolution of inquiry into the right of the President to govern the occupied places, so earnest was the wish of those denouncing the war that no American government should exist in Mexico. The resolution was elaborately answered, and in the next March the President fully explained to Congress the system of military contributions he had organized in the portions of Mexico occupied by our army, but yet notwithstanding the complete and ample information he had at every step laid before Congress, another inquiry was made by the House of Representatives six days after peace had been proclaimed, which again betrayed the

solicitude and jealousy of the Opposition regarding the governments in the new acquisitions which had been established during war by the military executive.

The published official documents of the period exhibit the fidelity with which Polk's Administration endeavored to rid itself of the responsibility of governing the new territories after the cession, and an unpublished private diary kept by the President, a copy of which I have been permitted to examine, leaves no doubt of his zealous efforts to open the closure created by the slavery question.

Under date of Tuesday, July 11, 1848, the diary records:

"Resolutions of the House of Representatives calling for information upon the several points connected with the manner of prosecuting the war with Mexico, and particularly the establishment of temporary civil governments in the conquered provinces, were delivered to me by Mr. Campbell, the Clerk of the House of Representatives, this morn-

ing. They were passed on yesterday on the motion of Mr. (Alexander H.) Stephens, of Georgia, who, I learn, made a violent, vindictive speech, and one personally abusive of me. It was in the same speech that he took occasion to calumniate General Pillow (see this diary of yesterday). The resolutions are readily answered, though it will take some time to collect the information called for. . . .

"*Saturday, July* 22, 1848.—Several persons called this morning. The Cabinet met at the usual hour, all the members present. I read to the Cabinet my message in answer to the resolutions of the House of Representatives of the 10th instant. It was fully discussed and approved by the Cabinet. The phraseology of some of the paragraphs of it were modified. As it treated of some legal and political principles, of some intricacy as well as importance, I determined not to send it in to-day, but to read it before I did so to some of my friends in the House, that they might be prepared beforehand to sustain it, if attacked by the Whigs. Some other matters were considered and disposed of, but they were of no

special importance. But though of no great general importance they occupied the attention of the Cabinet until four o'clock P.M. Mr. Kaufman, of Texas, and Mr. Cobb, of Georgia, all of the House of Representatives, called, and I read to them my message in relation to California and New Mexico, and informed them fully of my views in relation to the matter embraced in it. They approved it, and expressed themselves fully ready to sustain it, if it should be attacked by the Whigs of the House, as it probably will be, as it is known that the call was prompted and made from political party motives."

The President's reply to the inquiry for the law under which he had acted (See *Messages and Papers of the Presidents,* vol. iv., pp. 594) was based on the previous opinion of the Supreme Court defining his authority, which opinion should have been known by the Whig member from Georgia who carried through the resolution.

Besides making it plain that the President used his utmost endeavor to remove the blockade against territorial legislation, the diary is interesting as showing that he and his Cabinet preferred an extension of the statutory Missouri line of 36° 30′ to the Pacific, and that Calhoun resisted it. Under date of July 7, 1848, is the following:

"... The necessity for settling the question is the greater, since the convention of Barnburners, held at Utica, New York, on the 22nd instant, have bolted from the regular Democratic nominations made by the Baltimore convention in May last, and have nominated Martin Van Buren for President and Henry Dodge, of Wisconsin, for Vice-President, distinctly upon the ground of the Wilmot Proviso. This is a most dangerous attempt to organize geographical parties upon the slave question. It is more threatening to the Union than anything which has occurred since the meeting of the Hartford Convention in 1814. Mr. Van

Buren's course is selfish, unpatriotic, and wholly inexcusable. The effect of this movement of the seceding and discontented Democrats of New York will be effectually counteracted, if the slave question can be settled, by adopting the Missouri Compromise line, as applied to Oregon, New Mexico, and Upper California, at the present session of Congress. If the question can be thus settled, harmony will be restored to the Union, and the danger of forming geographical parties be avoided. For these reasons I am using my influence with members of Congress to have it effected. . . ."

On August 14, 1848, was made another entry of historic interest relating to the failure of Congress to legislate for California, and to an incident of the enactment of the law organizing a territorial government for Oregon with exclusion of slave labor.

"*Monday, August* 14, 1848.—I rose early this morning, went to my office, and with my

private secretary carefully revised the message which I propose to send to the House of Representatives to-day, if the Oregon Territorial Bill should be presented to me, assigning my reasons for having signed it. I modified and changed several paragraphs, and caused some of the sheets, these in which the modifications were contained, to be recopied by Mr. C. H. Williams. At nine o'clock Mr. Toucey (Attorney-General) and Mr. Marcy came in, that being the hour appointed for my Cabinet to assemble to accompany me to the Capitol. Shortly afterwards Mr. Buchanan came in, and I was struck with a remark which he addressed to Mr. Marcy, to the effect: "Well, did you and Mr. Ritchie fix that paragraph in the message, after I left last night." I had the message in my hand, and replied to him by saying that the passage written by Mr. Ritchie had not been inserted. (See this diary of yesterday). I then read the paragraph as it had been prepared and inserted. Mr. Buchanan was still opposed to my sending in the message. I told him I had made up my mind to send it in. Mr. Marcy and Mr.

Mason thought I ought to send it in, under all the circumstances. About half-past nine o'clock I proceeded to the Capitol—accompanied by the members of my Cabinet, except Mr. Walker (Secretary of the Treasury) who was confined to his house by indisposition. Shortly after reaching the Vice-President's room, I learned that a debate was going on in the Senate, and shortly afterwards that a similar debate was going on in the House of Representatives against suspending the joint rule of the two Houses, which prevents any bill from being presented to the President for his approval or signature on the last day of the session. The two Houses had agreed to adjourn the session at twelve o'clock this day, and the object of the debate in both Houses was to prevent the question on suspending the rules from being taken until that hour, when the adjournment would take place and *the Oregon bill be of course lost.* Many other bills were in the same condition with the Oregon bill, and among others the army appropriation bill, without which it was impossible for the Government to get on, until the meeting of the next session. This

fact was made known to several Senators, to whom I also communicated the fact, that if Congress adjourned without passing the army appropriation bill, I would feel it to be my duty forthwith to issue my proclamation convening an extra session of Congress to meet on to-morrow. About quarter-past ten o'clock the discussions ended, the joint rule was suspended, and all the bills which had been matured were presented to me for my approval and signature. While I was very busy hastily examining the army and Oregon bills, Senator Calhoun came in, held a short conversation with Mr. Mason in a different part of the room from that which I occupied; Mr. Mason stepped to me and said Mr. Calhoun wished to see me. I stepped hastily to him with one of the bills in my hand. He urged me, if I would sign the Oregon bill, to announce the fact to the House of Representatives in which it originated, in the usual form, and not to send any written message with the ratification, as I had informed him last night I would probably do. I told him promptly that I had made up my mind, and would send in the written message. I re-

turned to my table, signed the Oregon bill, and my message, and sent my private secretary to the House of Representatives, who delivered it about three-fourths of an hour before twelve o'clock. I immediately made the nominations for the officers in Oregon to the Senate, and in a few minutes they were confirmed. I signed all the other bills which were presented to me, and the two Houses adjourned precisely at twelve o'clock."

Thus expired with that session of Congress all hope of legislation for California till the Presidential election had been held.

After the *débris* left by a departing Congress had been cleared away, the President and his Cabinet took up the problem presented by California. The following extract reveals the situation:

"The Secretary of the Navy read a despatch received last night from Commodore Jones, commander of the Pacific Squadron. The Secretary of War read a letter to the Paymaster-General from Paymaster Rich,

serving in California, and the Secretary of State read a letter from Mr. Larkin, formerly United States Consul at Monterey, in California. These several communications represent the increased richness of the gold region recently discovered in California; the rage which prevails among all classes to go in pursuit of it. Commodore Jones and Paymaster Rich represent the desertions from the squadron and the army, to go in pursuit of gold, to be such as to destroy all efficient service in both arms of the service. They represent also the state of anarchy and confusion existing in California, when, without any regularly organized government, there is no security for life, liberty, or property, and they represent the urgent necessity for the establishment of the authority of the United States by the organization of a government of some kind in that territory."

The topics to be considered by the President, the Heads of the executive departments, and their experts, were, first of all, the relation of California to the

Constitution and to the United States. Afterwards the right of the President to exact obedience to himself from persons in the new acquisition, the authority of the Treasury Department charged by Congress with the collection of Federal duties and taxes, and with the supervision of coast-wise commerce, over the ports of California; and, finally, the rights to be held and duties to be performed on the Pacific coast by the Secretary of War. The chiefs of the two departments most directly concerned were Marcy and Walker, two men of exceptional political wisdom and lawyers of undenied ability. An incident which precipitated consideration of the topics, and the result of that consideration, are described as follows:

"*Saturday, September* 30, 1848.— . . . After which I brought to the notice of the Cabinet the condition of New Mexico and California, and particularly of the latter. These territories acquired by the treaty with Mexico have been left by Congress without any

provision for their government. The temporary military governments which had been established under the authority of our military and naval commanders by virtue of the rights of conquest during the war had ceased to exist upon the ratification of the treaty of peace. The Mexican authority over the country had ceased. Our squadron is on the coast of California, and we have a small military force in the country. An additional regiment under the command of Brevet Brigadier-General Riley is about to embark. These forces will hold the country and protect the inhabitants against Mexican, Indian, or other enemies who might disturb them, *but the executive has no authority to organize a civil government over them.*

"In this state of things, I brought to the notice of the Cabinet an extraordinary letter Mr. Thomas H. Benton, Senator from Missouri, addressed 'To the people of California,' and closing as follows, viz.: 'Written at Washington City, this 27th day of August, 1848, and sent by Colonel Fremont.' This letter is published in the New York *Herald* of the 26th instant.

I am told it first appeared in a Western paper. It assumes to speak as from one in authority, and is in an arrogant tone, and calculated to do much mischief. Among other things it advises the people 'to meet in convention' and form an independent government of their own until Congress shall act, and instructs them what kind of government they should form. It is sent by Colonel Fremont, the son-in-law of the writer, and the inference is plain enough that he means they shall make Colonel Fremont the governor of the independent government they may form. Indeed, I think it pretty clear that this was the main object. The arrogance and whole tone of the letter is offensive, and must do harm, unless the people of California have assurances from the Government that they will be taken care of by the Government.

"I expressed the opinion, that the Secretary of State should address a letter to them similar to the one he addressed by my direction to the people of Oregon on the 29th of March, 1847, when Congress had failed to establish a territorial government over that territory. I thought that the

assurance should be given to them that I would, at the next session of Congress, earnestly recommend the establishment of a territorial government and the extension of our laws over them. This would probably satisfy them until Congress can act, and prevent any revolutionary movement among them. It would satisfy them, too, that the Government was attending to their interests, and that they need not be deceived by the semi-official and officious proclamation of Senator Benton, by which they might be led to believe that he spoke by the authority of the Government here. I expressed my indignation in strong terms at Mr. Benton's course.

"Mr. Buchanan expressed some doubts of the propriety of writing such a letter. I did not press the subject, but will at the next Cabinet meeting bring the subject up again, and direct a letter such as I suggested to-day to be written.

"Mr. Walker, the Secretary of the Treasury, stated that he had been called upon by the Collector of Boston to decide whether goods, being the production of California, im-

ported into the United States, were subject to duty, I decided promptly that as California was *a part of our own country* by the treaty with Mexico such importations were not subject to duty. In this he and all the other members of the Cabinet concurred. They concurred also in the opinion that goods, the products of the United States shipped to California, were subject to no duties. The Secretary of the Treasury had doubts whether foreign cargoes shipped to California could be permitted to land, and be vended, duty free, or whether they should not be required to pay duties in Oregon, or some other collection district of the United States, and then be landed in California. This question was not decided, but was reserved for further consideration. The revenue laws of the United States have not been extended over California, and we have no collection districts in that country. Some other matters were considered, and about three o'clock P.M. the Cabinet adjourned. I spent the balance of the afternoon in my office, as is my usual habit.

"*Tuesday, October* 3, 1848.— . . . I brought

again before the Cabinet the subject of the condition of New Mexico and California and Senator Benton's extraordinary letter to the people of California (see this diary of Saturday last, the 30th of September). I stated that I still thought a letter should be addressed to the people of California by the Secretary of State, such as I suggested on Saturday, and that I thought also that the instructions to be given to General Riley, who would command our land forces in California, should be now considered and settled. An earnest and protracted discussion, or rather comparison of views, upon these points took place, in which all the members of the Cabinet took part.

"Congress had left California without a territorial government. That territory is now a part of the United States, and by an act of Congress our Post-Office laws have been extended over it. In my message to Congress announcing the peace with Mexico, I expressed the opinion, that at the termination of the war the military government established over it during the war, and when it was a conquered province, ceased; and

that the authority of Mexico over it had ceased also when the treaty ceding it to the United States was ratified. *The question of difficulty was, what government existed over the country until Congress should act, and what power to govern it the executive possessed.* That the late military government was a government *de facto* in existence was probable, but could the executive enforce obedience to it?

"Senator Benton in his letter had recommended that the people should meet in convention and form a government for themselves. Mr. Toucey (Attorney-General) thought that the sovereignty of the territory rested in the people, and that they could, in the absence of the action of Congress, govern themselves as they chose, and that the existing government *de facto* was presumed to be in force by their consent. Mr. Mason (Secretary of the Navy) was of a different opinion. He thought that the sovereignty rested in the people of the United States and not in the people of the territory. Mr. Walker (Secretary of the Treasury) concurred in opinion with Mr. Mason. He thought that

if the right to form such a government as they chose was conceded to the people of California, there was nothing to prevent them from establishing a monarchy, or from disposing of the public lands. Mr. Johnson (Postmaster-General) thought that the existing government *de facto* was the only one which could exist until Congress acted. Mr. Marcy (Secretary of War) was also of this opinion. Mr. Buchanan (Secretary of State) thought that the people might form a temporary government, not inconsistent with the Constitution of the United States, but that it would be very unwise for them to do so, and that they should be advised to submit by consent to the existing government. He concurred with me in the opinion that it was important to write the instructions I had proposed, and send them to California before Senator Benton's letter reached California.

"After an anxious and very potent discussion, I stated that it was a subject which from its novelty was surrounded with many difficulties, but I thought instructions could be prepared which would avoid the decision

of any *abstract doubtful question.* I proposed for consideration that Mr. Buchanan should prepare instructions for Mr. Voorhies, the Post-Office agent who is about to proceed to California, which instructions he should make known on his arrival in the country, to the following effect, viz.: that the inhabitants should be informed that California was now *a part* of the United States; that the Constitution of the United States extended over them and was in force; that Congress had failed to establish a territorial government over them; that the President would strongly recommend the establishment of such a government at the next session, and that there was every reason to believe it would be done, and that in the mean time they were advised to consent to the existing government *de facto,* so far at least as the rights of person and property were concerned. To this all agreed.

"I proposed further that he should inform them that they had no right *under the Constitution* to meet in convention, and abrogate the present government *de facto* and form a new one; that if this was done it would not

be by virtue of any authority derived from the Constitution, and could only be justified by the extreme necessity of their condition. Upon this latter point no distinct question was taken, but it seemed to be acquiesced in.

"I proposed that Mr. Marcy should give General Riley similar instructions. It was agreed that Mr. Buchanan and Mr. Marcy should prepare instructions accordingly, and submit them for consideration at the next meeting of the Cabinet.

"I requested Mr. Walker to prepare and report, at the next meeting of the Cabinet, what regulations he possessed the power to make in relation to foreign commerce with that territory. *In regard to our commerce, it was agreed that this was regulated by our laws relating to the coasting trade.* After a sitting of five hours, the Cabinet adjourned about four o'clock P.M.

"*Saturday, October* 7, 1848.— . . . The Cabinet assembled at the usual hour; all the members present, except the Secretary of the Navy. Mr. Buchanan submitted the draft of instructions, which he had prepared, to the people of California in the form of a letter

to be addressed to Mr. William V. Voo(r)hies, who was about to proceed to California as an agent of the Post-Office Department. These instructions were prepared in pursuance of my directions at the last Cabinet meeting (see this diary of the 3d instant). They were read and after full discussion were modified in some respects.

"Besides other modifications it was agreed to insert a clause in relation to the revenue laws and regulations established by the temporary military government during the late war with Mexico, this being regarded as a government *de facto* still existing by the personal consent of the people of California. It was agreed that the duties levied on importations into California by this *de facto* government could not continue to be collected by it conformably to the Constitution of the United States.

"The Secretary of the Treasury presented his views, which were that California, being now a part of the United States, all the productions of California were entitled to be imported into any of our ports on the Atlantic free of duty; that all the products of foreign

countries which had paid duties at any custom-house in the United States and all foreign articles which by our tariff were duty free, were entitled to be imported into California duty free. In other words, California being now a part of the territory of the United States *our laws regulating the coasting trade were applicable to that country.* The Secretary of the Treasury also expressed the opinion that foreign cargoes, subject by our laws to pay duty, would also be subject to such duties in California, but as Congress had established no collection districts and authorized the appointment of no officers to collect such duties, *he possessed no power to do so.* He said further that if foreign goods were taken into California without paying duties, and should afterwards be shipped to any of our Atlantic ports, or collection districts, they would be subject to pay duties. These views were approved by the Cabinet.

"Mr. Buchanan had expressed an unwillingness to insert in his letter of instructions anything which would break up the foreign trade of California with the Sandwich Islands, the South American States, and

other countries, fearing that, if done, it might dissatisfy the people, and incline them to prefer Senator Benton's advice and attempt to hold a convention and establish an independent government for themselves. He wished to avoid this, and thought it better to say nothing about the foreign trade with California and leave it as it was, for the short time which would intervene, until Congress could meet and act on the subject. He, however, concurred and acquiesced in the views upon the subject presented by Mr. Walker. Mr. Buchanan retired to the adjoining room to prepare a paragraph embodying Mr. Walker's suggestions. While he was gone from my office, Mr. Walker also prepared the draft of a paragraph at my table. When Mr. Buchanan returned both paragraphs were read. The substance of both was the same, though the phraseology of neither was satisfactory; and it was agreed that they should prepare the draft after the Cabinet adjourned.

"The Secretary of the Treasury stated that he had been called on from Boston and other places for his opinion both in regard to the

coasting and foreign trade with California. It was agreed that he should prepare an answer, in conformity to the suggestions upon the subject which he had made to-day, and which it had been determined should be inserted in Mr. Buchanan's instructions, and that Mr. Buchanan should accompany his instructions with a copy of this answer.

"It was agreed that the Secretary of War should furnish the military officer in command in California with a copy of Mr. Buchanan's instructions and also a copy of Mr. Walker's answer to the communications from Boston and other places, and should incorporate them into his instructions to that officer. The Secretary of War read the draft of instructions on the subject which he had prepared, in pursuance of my directions at the last Cabinet meeting. They required modification, and, after considering his paper, he said he would make another draft and submit it to me before it was sent off.

"I submitted to the Cabinet the propriety of uniting the two military departments or districts in Oregon and California into one, and of putting it under the command of

General Persifer F. Smith, putting upon him his brevet rank as a Brigadier-General. This had been suggested to me by Mr. Buchanan on yesterday. On reflecting upon the subject I approved it, and so did the whole Cabinet when I presented it to them. General Smith had been previously ordered with his regiment of mounted riflemen to Oregon, and General Riley with his regiment of infantry to California; both to be in command as colonels of the line and not to be put on their brevet rank. General Smith is a man of education and intelligence and possessed of much knowledge of civil government, as well as military command, and it was desirable to have such an officer in chief command in California in the present anomalous state of that country. These were the reasons for making the change of the original arrangement. The Cabinet, all approving the suggestion, I determined to carry it out. General Smith being in the city, I addressed a note to him requesting him to call. He did so and I communicated to him in the room adjoining my office what my wish was, and that I desired to know whether such a change

of the orders which had been previously given would be agreeable to him. He said it would be entirely so; and added that he was ready to perform any service he might be ordered to perform, and that he was very grateful to me for the advancement I had heretofore conferred upon him. He left and I informed the Cabinet of my interview with him. . . .

"*Monday, October* 9, 1848.—. . . The Secretary of War read to me his instructions to the officer in command of the military forces in California, prepared in pursuance of my directions at the Cabinet meeting on the 7th instant (see this diary of that day). With one or two modifications, which he made at my suggestion, I approved them. He read to me also a copy of the circular letter to collectors of the customs, on the subject of duties in California, etc., prepared by him in pursuance of the decision made in the Cabinet on the 7th instant. The Secretary of War transmitted a copy of the circular, and a copy of Mr. Buchanan's letter of instructions to Mr. Voorhies, with his instructions. . . ."

In the opinion of the Supreme Court in *Fleming vs. Page,* decided two years after the events thus recorded by President Polk, there is this remark:

"The Department" (Treasury), "in no instance that we are aware of since the establishment of the Government, has ever recognized a place, in a newly acquired country, as a domestic port from which *the coasting trade* might be carried on, unless it had been previously made so by act of Congress."

With commendable strategical instinct, the remark was seized by the five Justices upholding the Foraker law as a point of advantage upon which to argue that in Porto Rico there was not a domestic port, even although the Foraker law had recognized ports of entry in the island.

It is noteworthy that a greater part of the cases in which the court has considered the relation of territories to the Constitution and the Union have been revenue suits, and that the court has always

regarded with great deference the action which the executive has taken. The letters of instruction, referred to by Polk in his private diary, were considered by the court in *Cross vs. Harrison* (1853), and approved, and especially the orders that the Government *de facto* shall not exercise any "power inconsistent with the Constitution of the United States, which is the supreme law of the land." If in *Fleming vs. Page* the attention of the court had been invited to those letters, it is incredible that it would have made the error regarding a fact in executive administration which it did make, inasmuch as Polk's Administration did in 1848 recognize San Francisco as a domestic port from which the coasting trade might be carried on, even although the law establishing a custom-house and authorizing the appointment of a collector was not enacted till March 3, 1849, the day before Taylor became President.

It is not probable that the President

ordered the rates of duty and the free list of the general tariff law to be enforced at San Francisco late in 1848, excepting in the sense that an executive act is by law presumed to have had the President's command. An order relating to customs affairs sent from Washington after the treaty of peace, would have been sent by the Treasury, which superintends the collection of revenue. Presumably the change of tariff late in 1848 was made on the initiative of the military officers at San Francisco.

The President's diary makes very plain his solicitude over California as the time for the reassembling of Congress drew near, and the intensity of partisan bitterness at the time. These are extracts from that record:

"*Monday, December* 11, 1848.— . . . Senator Douglas of Illinois called and held a long conversation with me on the subject of a bill which he had introduced into the Senate to *admit California and New Mexico*

into the Union as a State, instead of establishing territorial government in the first instance over them. . . .

"*Tuesday, December* 12, 1848.— . . . I then stated to the Cabinet that I feared no action would be had at the present session of Congress for the government of California and New Mexico; that I feared this would be the case, from the want of concert of action, or any common views among the members of Congress, with whom I had conversed. I stated further that I apprehended, if these territories were left without a government for another year, and especially California, they might be lost to the Union. I gave my views at some length for this apprehension. They were in substance, that in the course of the next year a large population would be attracted to California by its mineral wealth and other advantages; that among the emigrants would be men of enterprise and adventure, men of talents and capital; and that finding themselves without a government or the protection of law, they would probably organize an independent government, calling it the *California* or *Pacific*

Republic, and might endeavor to induce *Oregon* to join them. I stated that, if this state of things existed when Congress came together twelve months hence, the leading Federalists (alias Whigs) would be glad to avail themselves of the opportunity to give up the country for the purpose of relieving General Taylor of his embarrassment upon the *Wilmot Proviso.* I added that the Federal party had, from the commencement of our history, been opposed to the extension of our limits; that they opposed the acquisition of Louisiana as they had recently done that of our new possessions. To guard against the loss of California, I deemed it very important that the question of its government should be settled at the present session of Congress. I then stated that I thought it indispensable that we should agree upon a plan of settlement (for Congress seemed to have no plan), and exercise what influence we might possess to carry it through at the present session. All present agreed that this would be proper, and indeed our duty. It is a question rising above ordinary party considerations. We have a country to serve as well as a party to

obey. On comparing information as far as we had been able to collect it, from conversations with members of Congress, we were satisfied that neither of the propositions for the settlement of the slavery question presented at the last session of Congress could prevail; and that either of them would be embarrassed by the *Wilmot Proviso* in the House of Representatives. What then was to be done was the question! Senator Douglas, of Illinois, had introduced a bill into the Senate to admit both California and New Mexico into the Union as *one State.* The territory we were all of opinion was too large, and the settlements in it too detached and distant from each other to form *one State.* After full consideration it was agreed that I should see Senator Douglas and advise him to modify his bill so as to admit *California* alone into the Union as a State, and to bring in a separate bill for the government of New Mexico. *All were agreed* that this was the most feasible plan of settling the slavery question, by leaving it to the inhabitants of the new State to decide the question for themselves, and at the same time avoid the

danger of losing California, of which there was very great danger, if the present session of Congress adjourned without acting on the subject. . . .

"*Wednesday, December* 13, 1848.—Senator Douglas, of Illinois, called this morning at my request, and I communicated to him fully my views in relation to the slavery question and the admission of California into the Union *as a State,* and the propriety of bringing in a separate bill for the government of New Mexico (see this diary of yesterday). He thought well of my suggestions of modification of the bill he had introduced into the Senate, and said he would consider them, and confer with Senators on the subject. At my suggestion he said he would call and see Mr. Buchanan on the subject.

"Many members of Congress called this morning, and among them Mr. Calhoun, of South Carolina, who had reached Washington only a day or two ago. I had some conversation with him, in which I expressed my opinions on the subject of the slavery question, and the government of California and New Mexico. They were in substance

the views entertained in the Cabinet on yesterday (see this diary of that day). He expressed no decided opinion, said he had not read Mr. Douglas's bill or my message, but expressed himself as anxious to settle the question at the present session. . . . I learn from my private secretary this afternoon that a vote was taken in the House of Representatives to-day approving the *Wilmot Proviso* by a considerable majority. Some of the Northern Democrats are giving way and reversing their votes of the last session, and I am the more satisfied that unless Senator Douglas's bill is accepted no adjustment of the territorial question can be effected at the present session.

"*Friday, December* 15, 1848.— . . . I addressed a letter to General Cass to-day, giving him a statement of the difficulties which were encountered on this subject. I took the occasion also to inform him of what I had learned from Senator Foote on the 13th instant (see this diary of that day) that he [Cass] might be returned to the Senate from Michigan, and that in that event, some of the Whigs were predicting that he would be

instructed to vote for the *Wilmot Proviso,* and that if he obeyed, he would have to abandon the ground he had taken in his Nicholson letter, and I gave him my opinion on the subject. I refer to my letter to him, a copy of which will be found in my letter book. . . .

"*Tuesday, January* 16, 1849.— . . . Between ten and eleven o'clock Senator Calhoun, of South Carolina, called. He has not been to see me since his arrival in Washington, shortly after the meeting of Congress. . . . He was opposed to the admission of California as a State, because slave-holders had been prevented from emigrating with their property to it, and it would be a free State. I replied that whether admitted now or hereafter, the people inhabiting the country would have the right when they came to form a State constitution to regulate their own domestic institutions, and that Congress could not prevent this. He proposed no plan of adjusting the difficulty, but insisted that the aggressions of the North upon the South should be resisted, and that the time had come for action. I became perfectly sat-

isfied that he did not desire that Congress should settle the question at the present session, and that he desired to inflame the South upon the subject, whether from *personal* or patriotic views, it is not difficult to determine. I was firm and decided in my conversation with him, intending to let him understand distinctly that I gave no countenance to any movement which tended to violence or the disunion of the States. The conversation was interrupted by the arrival of a member of the Cabinet, this being the regular day for the meeting of the Cabinet. All the members of the Cabinet were present, except the Secretary of the Treasury. Several matters of no general importance were considered and disposed of. After the other members of the Cabinet had retired, I gave a relation of my interview with Mr. Calhoun to Mr. Mason and Mr. Johnson, who remained. . . .

"*Thursday, January* 18, 1849.— . . . At dinner to-day I had a casual conversation with Senator Clarke, of Rhode Island, on the subject, in which I remarked that there was danger that California would be lost to the

Union unless a government was provided for the inhabitants of that territory at the present session of Congress. To which he replied: 'Let her go.' I said to him that if California set up an independent government, and separated from the Union, the Eastern States would be much injured by it. He thought not, said their ships and commerce would derive as much advantage if she was independent as if she was connected with the Union. The sentiments he expressed confirm the opinion I have heretofore expressed, that the *old Federal party* will avail themselves of any pretext to prevent the extension of our territorial limits (see my opinions on this point, recorded in this diary some days ago). . . . Mr. Buchanan stated the fact that he had called on Mr. Stephens, a Whig member of the House of Representatives, from Georgia, who is a member of the Committee on Ways and Means of the House of Representatives, and had requested him to aid in passing the bill *at an early* day, making an appropriation for the payment of the instalment under the treaty with Mexico, and that he was much surprised to learn from

Mr. Stephens that he was opposed to making any appropriation for that purpose. Mr. Buchanan stated that he expressed to him his surprise that he should be willing to violate the public faith by withholding the appropriation stipulated by the treaty to be paid to Mexico, and that Mr. Stephens had replied that he was opposed to retaining California and New Mexico acquired by the treaty as a part of the Union. This is in accordance with the opinion expressed to me by Senator Clarke, of Rhode Island, on the 18th instant (see this diary of that day), and still further satisfies me that the Federal party only want a pretext to surrender up the valuable territories acquired by the late treaty with Mexico. This makes the step resolved on by the Cabinet to-day still more important. . . .

"*Tuesday, February* 13, 1849.— . . . Despatches received last night from Commodore Jones, commanding the Pacific squadron on the California coast, were read by Judge Mason. Letters received from Mr. Parrot, consul at Mazatlan, and bearer of despatches to the army and naval officers

on the Pacific, and from an officer of the Quartermaster's Department were read by Mr. Marcy. They show a deplorable state of things in California, where the inhabitants are left without law or government, but notwithstanding this I fear that Congress will provide no government for them at the present session. . . .

"*Saturday, March,* 3, 1849.—. . . I had gone to the Capitol this evening under the impression that without a critical examination of the subject my official term as President of the United States would expire at midnight on the night of this, the 3d day of March. The correctness of this opinion was shaken by the views presented by some members of my Cabinet, and by many members of Congress, Whigs and Democrats, who called on me as the hour of twelve o'clock at night approached, and insisted that as by the Constitution the President shall hold his office for the term of four years, and as I had not taken the oath of office until between the hours of twelve and one o'clock on the 4th of March, 1845, my term of office would not expire until the same hour on the 4th of

March, 1849. It was certain, too, that if my term as President had expired, that of the House of Representatives and of one-third of the Senators had also expired. The two Houses of Congress were still in session; the general appropriation bill, without which the Government could not get on, remained to be passed. On the other hand, several Senators—and among them Senators Cass, Allen, and others—I learned were of opinion that the term of the Congress and of the President had expired, and declined to vote. In the state of doubt upon the question which had been produced in my mind, by the conflicting views which were presented, I had remained at the Capitol until one and two o'clock by the timepiece in the Vice-President's room. Great confusion I learned prevailed in the two Houses, as well as great excitement upon the slave question. After two o'clock I proposed to retire from the Capitol to my lodgings. This was strongly opposed by Messrs. Buchanan, Walker, Marcy, and Toucey. Mr. Mason and Mr. Johnson thought I ought to retire. Mr. Charles A. Wickliffe, of Kentucky, formerly Postmaster-General, came

into the room, and I asked his opinion confidentially, and he advised me not to retire. I remained until between three and four o'clock A.M. of the 4th of March, when I informed the Cabinet of my determination to retire to my lodgings. Messrs. Buchanan, Walker, Marcy, and Toucey still opposed it. I informed them that I *would* retire to my quarters at Willard's Hotel, where I could be found if Congress should have any communication to make to me; but informed them at the same time that I would hold myself uncommitted as to my course, if Congress should send me any bill for my action. I said the same thing to some members of Congress. I retired accordingly, accompanied by Mr. Mason and Mr. Johnson. The other members of the Cabinet remained at the Capitol. My private secretary also remained at my request. . . . About six o'clock A.M. I was called and informed that a committee of Congress were in my parlor waiting to see me. I repaired immediately to the parlor, for I had not undressed. The Joint Committee on enrolled bills of the two Houses of Congress presented to me for my approval

and signature two bills; one being the Civil and Diplomatic Appropriation Bill and the other *a bill to extend the revenue laws of the United States over California.* The Civil and Diplomatic Bill did not contain the obnoxious amendment of the House of Representatives which I had resolved to *veto.* The bill had been amended so as to strike out not only the House amendment in relation to slavery, but to strike out also Senator Walker's provision for the government of California and New Mexico so as to leave the bill the ordinary annual appropriation bill for the support of the Government. I approved and signed the two bills, being unwilling to defeat so indispensable a measure as the Civil and Diplomatic Bill, the failure to pass which would have produced vast public inconvenience. I had been brought, too, to the opinion that my first impression as to the duration of my term might be erroneous. . . .

"*Tuesday, March* 5, 1849.— . . . On going up to the Capitol, California was alluded to in conversation between Mr. Seaton (editor of the *National Intelligencer*) and Mr. Winthrop (Whig Speaker of the House) and

myself. Something was said which drew from General Taylor (Whig President) the expression of views and opinions which greatly surprised me. They were to the effect that California and Oregon were *too distant* to become members of the Union, and that it would be better for them to be an independent government. He said that our people would inhabit them, and repeated that it would be better for them to form an independent government for themselves. These are alarming opinions to be entertained by the President of the United States. I made no response, nor did Mr. Seaton or Mr. Winthrop. I have entertained serious apprehensions and have expressed them, in this diary, that if no government was provided for California, at the late session of Congress, there was danger that that fine territory would be lost to the Union by the establishment of an independent government. General Taylor's opinions, as expressed, I hope have not been well considered."

A few dates will aid a true appreciation of the California precedent.

California was conquered in 1847, and a military governor assigned by the War Department. The treaty of peace was concluded on February 2d, ratifications were exchanged on May 30th, and proclaimed July 4th, but not officially known in San Francisco till August 7, 1848. Congress did not enact a customs collection district and make San Francisco a port till March, 1849, nor did a collector of customs arrive at his post until November 13, 1849. California never had a territorial government, and was not admitted as a State till September 9, 1850. Till November 13, 1849, a military collector, appointed by the military governor, levied and collected duties at San Francisco on imported merchandise, according to a military schedule of rates, until the autumn of 1848, and thereafter according to the tariff which had been enacted in 1846 for the whole country.

There were the following intervals: Four and a half weeks after proclamation

of the treaty before it was known in San Francisco; three months after proclamation before officials in Washington gave definite instructions concerning the treaty; eight months after proclamation before Congress made a customs port of San Francisco; six months before the civilian collector of customs entered on his duties, and twenty-six months before California was admitted to be a State.

It seems to have been the opinion of the five Justices that, during every interval between cession of foreign territory and incorporation of the cession, the government for the acquired territory recognized by the Constitution is "military power under control of the President as commander-in-chief." The territory is in effect, during that period, a miltary district governed like a battle-ship at sea. But what laws and whose laws are to be enforced? Only the political power can control the duration of the interval, say the five Justices, and the judicial power

cannot either limit, or interfere with, or question the duration, which "involves circumstances the judiciary can take no account of, or estimate." Congress, therefore, can, by not incorporating the Philippines, keep the archipelago and all the new islands in the uncontrolled hands of the War Department. Meanwhile, the courts are powerless to condemn an act unlawfully done by the executive making new laws, laying new taxes and new rates of duty, and generally *legislating* for the unincorporated islands.

In 1853, the Supreme Court was called upon to pass judgment on that which Polk had described in his private diary.

Cross, an importer, paid under protest the duties exacted at San Francisco between February 2, 1848, and November 13, 1849, by the military collector, Harrison, and brought suit to recover them upon the ground that Harrison had no lawful right to levy either the war rates up to late in the autumn of 1848, nor

afterwards those of the general tariff law. The Supreme Court upheld the exaction. The suit had nothing to do with the civil rights, or the political status, of Californians, any more than had the issue in the *Downes* suit to do with the civil rights and political status of Porto Ricans, since the only question was whether or not, after the ratification of the treaty, free-trade existed as now between the ports of Porto Rico and the port of New York, despite the Foraker law. It was quite immaterial who inhabited California or Porto Rico, or what civil and political rights those inhabitants had. Were California and Porto Rico, at the dates of the importations, possessions of the United States; were they within the boundaries of the United States; was the soil, and were the ports of each, *de facto* and *de jure,* under the sovereign jurisdiction and so *a part* of the United States? That California and Porto Rico were States of the United

States no one could assert. The only question was whether or not the money had been legally exacted by order of the military governor of California after the ratification of the treaty of peace and down to the arrival of the civilian collector. The court said the money had been legally exacted, and if collection districts had not been established by Congress it was inconsequential. The letters of instruction sent to San Francisco by the heads of executive departments at Washington, described by Polk in his diary, were reviewed. It commended what the diary records that the President decided, in October, 1848, to do in California. It gave judicial absolution to the President for the duties exacted, and modified the remark made by the court three years before in *Fleming vs. Page.* In some few particulars, regarding the extension of military rule, the court went further than Polk and his Cabinet deemed he had constitutional authority to go.

The fact is that a unanimous court adjudged in *Cross vs. Harrison* that "after the ratification of the treaty, California became *a part* of the United States," and that a bare majority in the recent *Downes* case adjudged that Porto Rico "is not *a part* of the United States." Each case included and comprehended duties on imported merchandise, and nothing else. The ports of California and Porto Rico belonged to the United States as exclusively, absolutely, and by as valid a title as did the port of New York. The treaty-making power had extended the boundaries of the United States so as to embrace California and Porto Rico. No law of Congress could make the embrace more complete and valid. It had not made them States, but that was inconsequential as to the question of custom-house duties, as was the inquiry whether or not the inhabitants were foreigners. The Supreme Court had deputed its Chief-Justice to sum up

the law of the whole matter when Marshall said that "ceded territory becomes *a part* of the nation to which it is annexed either on the terms stipulated in the treaty of cession, or on such as its new master shall impose." At any rate, and in either case, it is "a part." California and Porto Rico had been "annexed." California did not belong to Mexico, nor Porto Rico to Spain. Porto Rico was not left independent under the treaty like Cuba. The soil and ports of Porto Rico were American. No determination by Congress of the civil rights and the political status of the inhabitants could change that Constitutional fact. California was, by ratification of the treaty, such *a part* of the United States that there was free-trade between it and New York. Californian ports had ceased to be foreign and had become domestic, even although not yet the ports of a State in the Union.

The judgments in the two cases cannot

stand together, unless the recent Spanish treaty is so unlike the previous treaties as to compel the disagreement, but did those who ratified the Spanish treaty intend to upset a century of American jurisprudence in such matters?

The court said that on ratification of the treaty California "became *instantly* bound and privileged by the laws which Congress had passed to raise a revenue from imports and tonnage." That language is unambiguous! It defies misinterpretation! No casuistry can qualify it.

The private diary kept by President Polk does not leave any doubt that the long interval between cession of California and legislation therefor by Congress was abnormal, because the ship of state was pounding upon the rock of slave labor and the President could not get her off unless aided by Congress.

The private diary also makes it indisputable that Polk and his Cabinet

could not find any other source of the authority he exerted in California after the cession than necessity, and a presumed "consent of the governed" in order to prevent anarchy.

Probably neither Polk, nor Marcy, nor Walker fancied that the President could, in time of peace, exercise executive powers in California under the second article of the Constitution, and at the same time make laws under the first article which vests exclusively in Congress *all* legislative powers imparted by the people to the Federal Government. After reading Marcy's October letter, which the Supreme Court commended, it is difficult to think of that wise man consenting to make laws for California, as the War Office, through Colonial Governors, now makes laws, according to its pleasure, for our insular possessions, and thereby exerts over them a greater power than George III. exercised over the American colonies under a stupid colonial policy.

Had it not been for Polk's declaration to the Californians that they were "a part" of the United States, and his promise that all military officers exercising power on the Pacific Coast should obey the Constitution, and for the exceptional wisdom, firmness, and tact displayed by General Percifer F. Smith, the judicial circuit now assigned to Justice McKenna might never have been "a part" of our Union. And yet by that frail link, that mere hyphen, described as *de facto* government existing by necessity and supposed consent of the people, the Supreme Court has attached to the President those tremendous military powers, in time of profound peace, which are displayed in the opinions and the judgment of the majority in the *Downes* case. That is now the law of the land.

Congress is not likely to sell the new islands, or to abandon them, or to give to their inhabitants independent sovereignty, or during many years to "in-

corporate" them. If the Philippines were, as matter of fact, essential to the United States three years ago, either as a self-sustaining commercial depot, or as a naval station, or as a fortress, they are indispensable now. But who is to make laws for the millions of the yellow races inhabiting the fortress?

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